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Before the
Federal Communications Commission
 Washington, DC 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	MM Docket No. 01-65
)	RM-10078
Amendment of Section 73.202(b),)	RM-10188
Table of Allotments,)	RM- I0189
FM Broadcast Stations.)	
(Emmetsburg, Sanboin, and Sibley, Iowa,)	
and Brandon, South Dakota))	

To: Assistant Chief, Audio Division
 Media Bureau

REPLY TO OPPOSITION
TO PETITION FOR RECONSIDERATION

Saga Communications of Iowa, LLC ("Saga"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby files this Reply to the "Opposition to Petition for Reconsideration" filed January 10, 2003, by Eisert Enterprises, Inc. ("Eisert"). former licensee of KDWD(FM), Emmetsburg, Iowa.' Eisert opposed Saga's petition for reconsideration filed November 18, 2002, of the action of the Assistant Chief, Audio Division, Media Bureau, in the Audio Division's Report and Order in *Emmetsburg, Sanborn and Sibley, Iowa. and Brandon, South Dakota*, DA 02-2389, released September 27, 2002. Public Notice was given in 67 Fed. Reg. 64048, published October 17, 2002 (herein "*R&O*")² The *R&O* denied Saga's counterproposal that sought

¹ On January 13, 2003, the Commission was notified that an assignment of license of KDWD from Eisert to Jim Dandy Broadcasting, Inc., had been consummated. A copy of this pleading is being served on counsel for Jim Dandy Broadcasting, Inc., as well as counsel for Eisert.

² Eisert is correct (at footnote 2) that the Commission has not yet released a public notice announcing Saga's petition, meaning that neither Eisert's opposition nor Saga's reply is yet due. However, Saga is filing this reply within the time limits set forth in Section 1.429 for replies as if Eisert had filed on the correct terminal date for oppositions.

to reallocate FM Channel 261C3 for vacant channel 261A at Brandon, South Dakota, and upgrade KDWD to operate on Channel 261C3 at Emmetsburg.

Background

Saga's counterproposal is mutually-exclusive with Eisert's proposal' in this Docket. Eisert filed its own counterproposal making the further request to delete Channel 262A at Sibley, Iowa, and allot Channel 264A to Sanborn, IA, as a first local service. **As** noted above, the Audio Division allotted Channel 261C3 to Emmetsburg, allotted Channel 264A to Sanborn, and deleted Channel 262A at Sibley, Iowa, based on the predicted net gain in population thought to be attendant to Eisert's proposal.

In its petition for reconsideration, Saga showed that the Audio Division erred in its *R&O*, and that the Division should reverse its action and allot Channel 261C3 to Brandon, South Dakota, as Saga has proposed, on the ground that 2000 U.S. Census data for the communities involved was not available at the time the counterproposals were filed in this proceeding, April 23, 2001. Since the 2000 figures materially alter the population analysis, Saga argued that this new evidence should be considered in this petition for reconsideration. Predictably, Eisert has opposed reconsideration, arguing that Saga's petition should be dismissed on procedural grounds; that Saga's revised data contradicts the Commission's findings; and that Saga may not seek to upgrade a vacant channel. None of Eisert's arguments are convincing. Saga renews its request that the Commission reverse the action taken in the *R&O*.

' See *Emmetsburg and Sibley, Iowa*, 16 FCC Rcd 4932 (2001) (herein "NPRM.")

Argument

Saga's Petition is Not Defective. Eisert chooses to argue procedure rather than address the fact that 2000 Census figures mandate the reversal of the Audio Division's action. Eisert claims that Saga is not entitled to file its petition for reconsideration under Section 1.429(b) [changed circumstances] because, although the revised Census data was not available when Saga and Eisert filed their counterproposals, it was available when Saga and Eisert filed their initial replies in the proceeding on May 8, 2001, and the subsequent replies on August 8, 2001. The attached "Technical Comments Concerning Opposition to Petition for Reconsideration" from Saga's Technical Consultant, William Brown, of Bromo Communications, Inc., explains that he first received the new census data on May 9, 2001, too late to use the data for the May 8 reply. Mr. Brown also discusses the methodology used (covered in detail *infra*) to compute the population figures. Additionally, Saga had no reason to question the figures placed in evidence by Eisert. However, upon further analysis, it has become clear the 2000 Census figures should be considered, if the Commission was relying on 1990 information when it adopted the *R&O*. Pursuant to Section 1.429(b) of the Rules, a party relying on new facts must show that these facts (1) relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) were unknown to it until after its last opportunity to present them to the Commission, and it could not, through the exercise of ordinary diligence, have learned of the facts in question until after the last opportunity; **or (3) the consideration of these facts would serve the public interest.** But, even if Saga had could have learned of the changed Census figures before the reply date passed, this petition would still be appropriate under Section

1.429(b)(3) of the Rules, since the consideration of these facts would serve the public interest. See *Sparta and Buckhead, Georgia*, 16 FCC Rcd 2169 (2001). The Commission should not make an allocation decision based on inaccurate or stale data. Eisert's citation of *Foulk and Biselli*, 3 FCC Rcd 5631 (1988) and *San Francisco IVDS, Inc.*, 16 FCC Rcd 18008 (2001) are unpersuasive, since the Commission's rules provide for the very procedure Saga has employed to seek reconsideration of an erroneous action. The doctrine of administrative finality in this instance is inapplicable.⁴ Notwithstanding Eisert's procedural arguments, it is the public interest, and not a party's private interest, that dictates that the Commission's staff should re-examine the population figures on which it based its *R&O*, and, if the 2000 Census figures so require, reverse its previous decision.

Saga's Revised Data Should Be Considered. As an alternative to Eisert's proposal, Saga proposed the upgrade of vacant' Channel 261A at Brandon, South Dakota," to Channel 261C3. Brandon had a 1990 population of 3,543. The 2000 U. S. Census found Brandon had a population of 5,693, a gain of about 38% since 1990. The revised census information shows that the current use of Channel 261A at Brandon would

⁴ Eisert's comments concerning its application to upgrade KDWD and what it claims are Saga's "goals" in footnote 9 are irrelevant to this rule making proceeding and may not be considered.

⁵ By *Report and Order*, DA98-2251, released November 6, 1998, *petition for reconsideration denied*, DA 00-2226, released September 29, 2000, the Commission allotted Channel 261A to Brandon, South Dakota (first local service), as a preferred arrangement of allotments over a proposal to substitute Channel 261C3 for Channel 262A at Sibley, Iowa. and modify the unbuilt (and now deleted) construction permit of former KAJQ, Sibley, Iowa.

"The present coordinates for Channel 261A at Brandon are 43-36-01 and 96-31-15. The allocation site for Channel 261C3 at Brandon is 45-35-45 and 96-30-50.

provide 60 dBu service to 159, 291 persons and an upgrade to Class C3 would increase the 60 dBu service to 186,606 persons. Upgrading KDWD from Class A to Class C3 would increase 60 dBu coverage from 24,466 persons to 49,405 persons. In the rule making proceeding, Eisert found that there was a population gain of 2,384 for its proposal. Saga found that there was a population gain of 1,766 for its proposal. The Commission's *R&O* found a population gain of 4,415 for the Eisert proposal, and so made the upgrade at Emmetsburg. However, the 2000 census figures show that there is a 2,376 person net gain for the Brandon proposal. The attached Technical Comments provide information on how Saga's revised population figures were derived, and suggest that Saga's are the more accurate of the three. The Technical Comments explain that Saga's methodology used the 2000 U. S. Census. Saga's technical consultants predicted the present KDWD Class A 60 dBu contour and assumed a maximum Class C3 for KDWD plus maximum Class A and Class C3 at Brandon at all listed reference points. The consultants projected the 60 dBu contours for each of these facilities using the 3-second terrain database, which is much more accurate than the 30-second database. The consultants also calculated the terrain at one-degree increments giving a total of 360 terrain radials. Using the FCC's 50, 50 curves, the consultants state, they felt that this methodology would give the most accurate projection of the 60 dBu contour. The population data is supplied by the U. S. Census. This database has divided the country into irregular, small areas called "centroids." The U. S. Census Bureau database has identified a reference point inside each of these centroids. If the centroid reference point falls within the predicted 60 dBu contour, then the entire centroid is added to the population. If the reference point is not inside the 60 dBu contour, then that centroid is

omitted from the population. The consultants state that they contacted [their computer software supplier, V-Soft Communications, and solicited their advice on how to most accurately determine population from their software programs. Saga's consultants were informed that V-Soft suggested the consultants use the same method as outlined above. Based on the foregoing, Saga believes its figures to be accurate and urges the Commission's staff to recompute the net population figures using the new population gain figures for Eisert's and Saga's competing proposals. Saga continues to believe that its counterproposal represents a preferential arrangement of allotments.

Eisert Has Mischaracterized the Law on Allotment Procedures. Eisert argues that Saga cannot request the substitution of Channel 261C3 for Channel 261A at Brandon on the grounds that "only permittees and licensees may take advantage of [Section 1.420(g)] to upgrade a channel." Eisert cites inapposite cases⁷ that do not support its position. The cases cited by Eisert prohibit a mere applicant (neither a permittee nor licensee) from filing a petition for rule making to upgrade a channel for which it has applied. But, Saga did not file its counterproposal under Section 1.420(g) of the Rules seeking to upgrade a channel for which it is an applicant. Saga proceeded under Section 1.420(d) of the Rules. The Commission accepted Saga's counterproposal (RM-10188) on Public Notice July 24, 2001, Report No. 2497, and processed it. The *R&O* analyzed and compared Saga's proposal to Eisert's. If Eisert wanted to challenge Saga's counterproposal on these grounds (which are specious), it should have filed its own

⁷ *Arlington, Texas and Durant, Oklahoma*, 8 FCC Rcd 4281, 4282 (1993); *Lafayette, Louisiana*, 4 FCC Rcd 5073 (1989); and *Santa Margarita and Guadalupe, California*, 2 FCC Rcd 6930 (1987), *review denied*, 7 FCC Rcd 4552 (1992).

petition for reconsideration, which it did not do. Saga's counterproposal was properly considered comparatively by the Audio Division.

Conclusion

In light of the above, the Commission should deny Eisert's proposal, and instead, delete Channel 262A at Sibley, Iowa, and substitute Channel 261C3 for Channel 261A at Brandon, South Dakota. Wherefore, Saga respectfully requests the Audio Division to reverse the action taken in its *R&O* and adopt its counterproposal as described herein

Respectfully submitted,

**SAGA COMMUNICATIONS
OF IOWA, LLC**

By 

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January 23, 2002

TECHNICAL COMMENTS CONCERNING OPPOSITION TO PETITION FOR RECONSIDERATION

Allotment of Channel **261C3** at Brandon, South Dakota

January 2003

These comments support the reply by Saga Communications ("Saga") to the Opposition to Petition for Reconsideration filed by Eisert Enterprises, Inc. ("Eisert") in MM Docket No. 01-65, RM-10078, RM-10188, RM-10189. The proposal would either upgrade KDWD at Emmetsburg, Iowa to a Class C3 facility or upgrade Allocated Channel 261A at Brandon, South Dakota to Class C3.

In the Commission's Report and Order the overall gain of population was the determining factor in granting the upgrade to Eisert and thus the Saga proposal was denied at Brandon. In the Comments filed by Saga in May 2001, we used both the 1990 US Census and 1999 estimate of population. Eisert asserted that the 2000 US Census was available at this time. This company had placed a standing order with our software supplier to purchase the 2000 US Census once that database became available. A check of our records shows the 2000 US Census was received and immediately uploaded on this firm's computers at 9:42 am on May 9, 2001. The Comments on this proceeding were due and filed on May 8, 2001. Therefore, we did not have access to this data until a day after the comments were due and filed.

Since population was the factor in the Commission's decision on this matter, we have taken an involved look into the calculation of population data. We find for comparison purposes that Eisert finds there is a population gain of 2,384 for their proposal, Saga finds there is a 1,766 population gain for their proposal and the Commission has determined that there is a 4,415 population gain for Eisert. This leaves a difference of 4,160 between Eisert and Saga, 2,031 between Eisert and the Commission and a 6,181 difference between Saga and the Commission. How did this happen when all three are based on 2000 US Census Figures using state of the art computers and software?

Our methodology used the 2000 US Census. We predicted the present KDWD Class A 60 dBu contour and assumed a maximum Class C3 for KDWD plus maximum Class A and C3 at Brandon at all listed reference points. In order to be as accurate as possible, we projected the 60 dBu contours for each of these facilities using the 3-second terrain database, which is much more accurate than the 30 second database that is commonly used by the Commission's staff. We went one step further to calculate the terrain at one-degree increments giving a total of 360 terrain radials. Using the FCC 50/50 curves, we felt this method would give the most accurate projection of the 60 dBu contour. The population data is supplied by the US Census Bureau. This data has divided the country into irregular small areas called centroids. The US Census database has identified a reference point inside of these centroids. If the centroid reference point falls within the predicted 60 dBu contour, then the entire centroid is added to the population. If the reference point is not inside of 60 dBu contour, then that

centroid is omitted from the population. The current state of the art US Census figures are not an exact science.

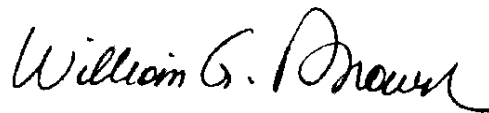
It is our understanding that Eisert's consultants make use of the same software that was used for Saga. However, we are unsure what method of determining population Eisert used, nor are we aware of the method used by the Commission.

To further investigate, we contacted our computer software supplier V-Soft Communications. We asked them for advice as to how to most accurately determine population from their software programs. They suggested we use the same methods that we had employed and have found many times over that this method was as accurate as the state of the art allowed. We also gave them our figures of which they were able to verify on their computers. We gave them the same figures as filed by Eisert. They tried using the 3 and 30-second databases and various numbers of radials from 8 to 360 and could not verify the Eisert population figures. Eisert may have used another method of calculating the populations or their figures could be in error.

We also have no way to verify the Commission's population figures

Thus we feel we have double-checked our population figures, had them verified by an outside source and that we have been as accurate and correct as the current state of the art allows.

Bromo Communications, Inc

A handwritten signature in black ink, reading "William G. Brown". The signature is written in a cursive style with a large, stylized "W" and "B".

William G. Brown


CERTIFICATE OF SERVICE

I, Sherry Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on this 23rd day of January, 2003, copies of the foregoing Reply were mailed, postage prepaid, to the following:

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